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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Filed
Dec 30, 1980

ROOSEVELT GREEN, JR.,

Petitioner,

- v -

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the infliction of the death penalty upon petitioner for a crime in which he himself has neither taken life, attempted to take life, nor intended to take life, would violate the Eighth or Fourteenth Amendments to the Constitution of the United States?

2. Whether the introduction into evidence of portions of the victim's corpse subjected petitioner to a capital sentencing decision so infected by passion and emotion as to violate the Eighth or Fourteenth Amendments?

3. Whether the State's use of a technical device to prevent petitioner from introducing significant mitigating evidence violated the Eighth or Fourteenth Amendments?

4. Whether the re-submission at petitioner's second sentencing trial of evidence of aggravating circumstances which a jury had refused to find established at petitioner's first sentencing trial subjected him to double jeopardy or deprived him of his life without due process, in violation of the Fifth or Fourteenth Amendments? (In the event that the Court does not grant certiorari on the other issues presented by this case, petitioner respectfully suggests that it should stay consideration of this fourth question pending its decision in Bullington v. Missouri.)

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner Roosevelt Green, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, ___ S.E.2d ___ (1980) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 7, 1980. A timely petition for rehearing was denied on October 31, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted "

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner Roosevelt Green, Jr., was convicted and sentenced to death for the December 12, 1976 murder of Teresa Allen.[1/] The death sentence was vacated in Green v. Georgia, 442 U.S. 95 (1979)(per curiam), because the exclusion of mitigating evidence in the capital sentencing proceeding as a result of the State's invocation of hearsay rules violated the Due Process Clause of the Fourteenth Amendment. A resentencing trial was held,[2/] and, on November 10, 1979, petitioner was again

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1/ Petitioner was initally convicted and sentenced to death by a judgment entered on January 28, 1978. The conviction and sentence were affirmed by the Georgia Supreme Court in Green v. State, 242 Ga. 261, 249 S.E. 2d 1 (1978).

2/ Following the vacating of the death sentence in Green v. Georgia, 442 U.S.95 (1979), the Georgia Supreme Court remanded the case to the trial court with direction to retry the sentencing portion of the trial. Green v. State, 244 Ga.27, 257 S.E.2d 543 (1979).

sentenced to death. The Supreme Court of Georgia upheld this death sentence. Green v. State, ___Ga. ___ S.E. 2d ___ (1980).

At the resentencing trial, the State presented evidence showing that Teresa Allen was abducted from the store in which she was working (T. 588-90, 911), was driven around through rural Georgia, and eventually was raped (T.835, 912) and shot twice at close range with a high powered rifle (T.839-41). The State's evidence showed that Carzell Moore killed Ms. Allen after he (either singly or together with petitioner) abducted and raped her. Moore, who lived very near the store in which Ms. Allen worked (T.600), had stolen a high-powered rifle some weeks before the crime (T.846, 919-21). Moore confessed to a lifelong friend, Thomas Pasby, that he had shot and killed the victim after abducting and raping her (T.911-13, 927-31); he also described in detail to Pasby his killing of Ms. Allen (T. 930-31). Moore was tried separately for the murder, and was convicted and sentenced to death. Moore v. State, 240 Ga. 807, 243 S.E. 2d 1, cert. denied, 439 U.S. 903 (1978).

The State presented evidence linking petitioner to the abduction of Ms. Allen. According to Pasby, Moore named petitioner as a participant in the abduction (T.911, 928-29). Petitioner was later arrested on an unrelated charge while in the possession of Ms. Allen's automobile and other items connected to the crime (T. 805-06, 851-54).

The State's evidence, however, did not show that petitioner participated in, or intended, the killing of Ms. Allen. Instead the evidence demonstrated that petitioner was not present at the time of the killing and did not know that Ms. Allen was to be killed. Moore's friend, Pasby, testified that Moore had admitted that he alone had killed Ms. Allen (T.911, 927-31) on an unpaved, rural road after having sent petitioner away "to go get some gas" (T. 912-13, 931). Pasby said that Moore

told him that petitioner did not know that Moore was going to shoot Ms. Allen (T. 931). The State's forensic evidence supported Pasby's account and further demonstrated that petitioner was not present at the time of the killing: plaster casts of footprints found at the scene of the crime included no footprints of anyone wearing high-heeled shoes (T.790), although petitioner had been wearing very high heels on the day of the crime (T.618, 787). The police did find smooth-soled tracks at the scene of the murder similar in size and shape to a pair of shoes owned by Carzell Moore (T.730-31, 790). And, although one witness, an acquaintance of petitioner from South Carolina, testified that petitioner told her shortly after the crime that "he had shot a girl somewhere in Georgia" (T. 940), this witness on cross examination qualified her testimony by acknowledging that petitioner may have said that his friend shot a girl in Georgia.[3/] After hearing all the evidence, the trial court indicated in its report to the Georgia Supreme Court that the evidence supported the presence of the mitigating circumstances that "[t]he defendant was an accomplice in a murder committed

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3/ "Q. Is it possible that he could have said to you something like this; that he had to go back to Georgia or he was going back to Georgia because he had a friend who shot a girl in Georgia and he was going to see about it? Is it possible that that is what he said?

A. Could have been, I'm not sure, you know.

Q. You're actually not sure what he said?

A. I'm--well, the conversation came up, you know, we was just sitting there talking and that came up in the conversation. I'm not sure whether that's the way he said it or whether he said he shot a girl in Georgia, you know.

Q. Could have been either way?

A. Yeah, could have been."

(T. 942-43).

by another person and his participation in the homicidal act was relatively minor" (R. 115).

The State also attempted to present evidence linking petitioner to the rape of Ms. Allen. Thomas Pasby testified that Moore had told him that petitioner participated in the rape (T. 912). However, this was not borne out by the testimony of the State's own forensic expert, who had examined vaginal swabs from Ms. Allen's body,and who explained that the swabs revealed only fluid with Moore's blood type and no trace of fluid from a person with petitioner's blood type (T.879-80). The State's evidence relating to petitioner's involvement in the rape and his possible theft of Ms. Allen's car was introduced over the objection of petitioner's counsel. Counsel argued that since the jury at petitioner's first trial had found that the aggravating circumstances of (i) murder committed in the course of a rape and (ii) murder committed for the purpose of receiving something of monetary value had not been present in the case,[4/] the submission of evidence on these issues at petitioner's resentencing trial violated constitutional protections against double jeopardy (T. 766-67, 832-35, 878-79, 912).

During the State's case, the investigating officer testified that a portion of an ear, a piece of bone with skin

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4/ In petitioner's first trial, the trial court instructed the jury on the statutory aggravating circumstances of murder committed in the course of a rape (Ga. Code Ann. § 27-2534.1(b)(2)),and murder committed "for the purpose of receiving money or any other thing of monetary value" (Ga. Code Ann. § 27-2534.1(b)(4)). See T. 767, 832-33; R. 124. In accordance with statutory requirements, the trial court instructed the jury to "designate in writing" on a verdict form if these aggravating circumstances had been "found beyond a reasonable doubt." Ga. Code Ann. 27-2534.1(c); see T. 767 832-33; R. 124. The jury's written verdict did not find either of these circumstances. T. 767, 832-33; R. 124.

attached, and other fragments of bone were found near the body of the deceased (T. 726-27). The State introduced into evidence a photograph of the severed ear, taken by the investigating officers at the scene of the crime (T. 728, 995). Over the objection of defense counsel, the State also introduced into evidence the remains of the ear itself, and the other pieces of bone and skin found near the body (T. 726-27, 994-95). The investigating officer, who identified the remains as portions of the victim's corpse, noted that "[t]hey have dried up some" (T. 727) and did not appear in the same condition as when they were found (T. 726-28).

Petitioner presented the testimony of two family members, his mother and sister in mitigation (T. 1005-12). Petitioner also sought to, but was prevented from, presenting a third mitigation witness--Father William James, a priest in Montgomery, Alabama, who had been the head of a foster home in which petitioner had lived (T. 19), and who could have offered substantial mitigating testimony on petitioner's behalf (T.18). On November 5, 1979, prior to the selection of the jury, counsel for petitioner informed the court that this out-of-state witness was prepared to come to court and testify, but that he would be in Texas and unavailable between Thursday, November 8th and Monday, November 12th (T. 18-20). Anticipating the possibility that the State's case might not be over before this five-day period, and recognizing the court's disinclination to permit a continuance which would allow Father James to come and testify after the five-day period (T.20),petitioner requested that if the State's case were not over by Wednesday, November 7, he be allowed to bring Father James to court on that date and take his testimony out of turn (T. 18-19). Although rejecting this procedure, the court agreed to the alternative procedure

of taking a written deposition outside the presence of the jury and then reading the transcript of the deposition to the jury during the presentation of the defense case (T. 19-20).[5/] The State remained silent and did not pose any objections to this procedure (T.19-20), and appeared to agree with the procedure (T. 638).

During the trial, however, when Father James appeared on November 7, the State suddenly refused to agree to the taking of the deposition (T. 638). As petitioner's counsel related to the court, the prosecutor declared that "Father James could wait around like any other witnesses." (T. 638). Since the court had conditioned the use of the deposition testimony upon the witness being fully subject to cross-examination by the State during the deposition (T.20), the deposition was not taken (T. 638). The trial proceeded, the State's case was completed on Friday, November 9th (T. 1004), and petitioner's case was presented on Saturday morning, November 10th (T.1004, 1012). Father James, as had been indicated, was not available on November 10th, and his testimony was never placed before the jury.

5/ The trial court initially proposed a procedure of "put[ting] a stipulation into the record . . . as to what he will testify to and . . . read[ing] the stipulation to the Jury" (T.19). However, after counsel for petitioner explained that "we would prefer that he be allowed to say it to the Jury" (T. 19), the trial court proposed the alternative of a deposition that could be read to the jury (T. 20). After counsel for petitioner agreed to the deposition procedure, the trial court stated: "Let's do it like that . . . ." (T. 20).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Supreme Court of Georgia, petitioner argued that his sentence of death is unconstitutionally excessive and disproportionate under the Eighth Amendment because he did not kill the victim or intend her death. Appellant's Supplemental Brief at 89-92.

In its opinion affirming petitioner's sentence of death, the Supreme Court of Georgia rejected petitioner's claim and stated that: "A rational trier of fact . . . could have found from the record, beyond a reasonable doubt, that the appellant either shot the victim or was present when it occurred." Green v. State, ___Ga. ___, ___ S.E.2d ___, slip opinion at 16. In support of this conclusion, the court pointed to "evidence that the appellant bragged that he had killed the victim," evidence that "[g]loves found at the murder scene had hair on it [sic] similar to both the appellant's and the victim's," and evidence that "a black male, with another black male as a passenger, was seen driving an automobile similar to the victim's . . . into a gas station near the scene of the crime." Id.

2. During trial, petitioner objected to the admission of the portions of Ms. Allen's corpse into evidence (T.994-95). Petitioner argued that these items had no probative value and that, since photographs of the items had also been introduced, "to put in actual member [sic] from a person's body into evidence for the Jury to look at . . . is only intended to inflame their minds . . . ." (T.994). The trial court overruled the objection and admitted the portions of the corpse, stating: "Well, I will admit them. It might have some probative value relating to the velosity [sic] of the weapon, something of that nature." (T. 995).

On appeal to the Supreme Court of Georgia, petitioner argued that the admission into evidence of the portions of the victim's corpse needlessly injected passion and prejudice into the resentencing trial, in violation of the Eighth and Fourteenth Amendments. Appellant's Supplemental Brief at 66-69. The Georgia Supreme Court rejected this claim, citing its decision affirming petitioner's original conviction and death sentence, in which the court had held this evidence properly admitted at the first trial. Green v. State, ___Ga. ___, ____ S.E. 2d ___ (1980), slip opinion at 6; see Green v. State, 242 Ga. 261, 268, 249 S.E. 2d 1, 6 (1978).

3. Prior to selection of the jury, counsel for petitioner obtained the agreement of the trial court and the apparent agreement of the State to a procedure for taking the deposition of Father William James, which would be read to the jury in mitigation in the event that the time for presenting petitioner's case fell during the five-day period in which this witness would be unavailable. (T. 18-20). However, the prosecutor suddenly retracted his agreement when the witness appeared for the deposition (T. 638), with the result that the deposition was never taken and the witness' mitigating testimony was never heard by the jury.

In his appeal brief, petitioner argued that the State's use of a technical device to keep significant mitigating evidence from the jury violated the Eighth and Fourteenth Amendments. Appellant's Supplemental Brief at 69-72. The Georgia Supreme Court rejected this claim, stating that the exclusion of Father James' testimony had resulted from defense counsel's failure to follow the trial court's proposed procedure of reading into the record a stipulation concerning the nature of Father James' testimony. Green v. State, __Ga. __,___

S.E. 2d ___, slip opinion at 7.

4. During trial, petitioner made a timely objection to the introduction of any evidence adduced to show that he participated in the rape of the victim or that he stole her automobile (T.766- 67, 832-35, 878-79, 912). Petitioner pointed out that the jury in his first trial had been instructed on the aggravating circumstances of murder committed in the course of a rape and murder committed for the purpose of receiving something of monetary value, and had decided that neither of these aggravating circumstances was present in this case (T. 766-67, 833). Thus, petitioner argued, the introduction of evidence concerning possible rape or theft of the automobile would be a resubmission of these previously decided issues to a second jury in violation of the constitutional prohibitions against double jeopardy (T.766-67, 832-35, 878-79, 912). The trial court overruled petitioner's objections (T. 767, 833), holding as to the evidence of rape, that "it is admissible under the second aggravating circumstance in that the offense was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant" (T. 833). The State thereupon introduced evidence from several witnesses on these events (T. 835, 871-72), and argued in closing that petitioner "killed, raped, robbed, kidnapped and mutilated" the victim (T. 1021).

On appeal to the Georgia Supreme Court, petitioner argued that the submission of evidence on issues of fact previously adjudicated in his favor violated Fifth Amendment prohibitions against double jeopardy and the principle of collateral estoppel embodied in the Fifth and Fourteenth Amendments. Appellant's Supplemental Brief at 62-65. The Georgia Supreme Court rejected this claim, holding that "statutory aggravating circumstances . . . are not offenses within the meaning of the double jeopardy clause." Green v. State, ___ Ga.___, __ S.E. 2d __, slip opinion at 5-6.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INFLICTION OF THE DEATH PENALTY UPON PETITIONER FOR A CRIME IN WHICH HE HIMSELF HAS NEITHER TAKEN LIFE, ATTEMPTED TO TAKE LIFE, NOR INTENDED TO TAKE LIFE, WOULD VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This case squarely presents a question reserved by the Court in Lockett v. Ohio, 438 U.S. 586, 609 n. 16 (1978): whether a sentence of death may constitutionally be imposed upon an offender to punish an offense in which he has not himself taken life or intended to take life.

That question is inescapably raised upon the face of the Georgia Supreme Court's opinion below, which affirmed petitioner's death sentence on the ground that "[a] rational trier of fact ... could have found from the record, beyond a reasonable doubt, that the appellant either shot the victim or was present when it occurred," Green, supra, slip opinion at 16 (emphasis added). The Georgia Supreme Court does not purport to say that any trier of fact did make either of these two alternative findings, let alone choose between them. No trier of fact has ever done so. Neither issue was explicitly or implicitly decided by petitioner's guilt or sentencing juries; and nowhere in this record has any finding ever been made by anyone that petitioner either personally killed Ms. Allen or "possessed a purpose to cause the death of [Ms. Allen]," Lockett v. Ohio, supra, 438 U.S. at 624 (White, J., concurring).

Indeed, the only basis in the record upon which a "rational trier of fact" could conceivably find that petitioner "either shot the victim or was present when it occurred" is the testimony of an acquaintance of petitioner's that petitioner

had told her that "he had shot a girl somewhere in Georgia," and this witness subsequently qualified her testimony by acknowledging that petitioner may have said instead that his friend shot a girl in Georgia (See page 4 & n.3 supra.)[6/] All of the other evidence adduced at petitioner's resentencing trial pointed plainly to the fact that petitioner did not kill or intend the death of Ms. Allen, and was not even present at the scene when she was killed. Carzell Moore owned the murder weapon, and admitted to a lifelong friend that he had killed Ms. Allen. Moore described his killing of Ms. Allen in detail to this friend. Moore furthermore admitted to his friend that he killed Ms. Allen while petitioner was away getting gas for the car, and that petitioner did not know that Ms. Allen was to be killed.[7/] The physical evidence gathered by the State supported this account of the facts: footprints found at the scene of the crime were consistent with a pair of shoes known to belong to Carzell Moore, while no prints of highheeled shoes like those petitioner had been wearing were found.[8/]

6/ In concluding that a rational trier of fact could have found beyond a reasonable doubt that petitioner shot the victim or was present when it occurred, the Georgia Supreme Court also pointed to evidence that "[g]loves found at the murder scene had hair on it [sic] similar to both the [petitioner's] and the victim's" and that "a black male, with another black male as a passenger, was seen driving an automobile similar to the victim's . . . into a gas station near the scene of the crime." Green v. State, supra, slip opinion at 16. Although this evidence could be found to link petitioner to the abduction of Ms. Allen, it provides no support for the conclusion that the petitioner shot the victim or even that he was present at the time of the killing. The evidence is not in any way inconsistent with Thomas Pasby's testimony that Moore stated that he and petitioner drove to the scene of the crime, that Moore then sent petitioner away to get gas before shooting Ms. Allen, and that petitioner did not know that Ms. Allen was to be killed.

7/ As this Court pointed out in its decision in this case, "the State considered [this] ... testimony sufficiently reliable to use it against Moore, and to base a sentence of death [for Moore] upon it." Green v. Georgia, supra, 442 U.S. at 97. See Moore v. State, 240 Ga. 807, 808-09, 243 S.E.2d 1, 4, cert. denied, 439 U.S. 903 (1978).

8/ The facts of this case in several respects parallel those of Bell v. Ohio, 438 U.S. 637 (1978). Like the petitioner in the present case, Bell participated in a companion's abduction of the victim but was not physically present when the companion killed the victim, and did not know that the killing was to occur. See Bell, supra, 438 U.S. at 639-40.

The logic of this Court's prior decisions strongly suggests that the Eighth and Fourteenth Amendments preclude the imposition of the unique and extreme penalty of death upon one who has not taken life or intended the death of the victim. The Court has held that the penalty of death is not per se excessive or disproportionate where "a life has been taken deliberately by the offender," Gregg v. Georgia, 428 U.S. 153, 187 (1976), but that it "is an excessive penalty for the rapist who, as such, does not take human life," Coker v. Georgia, 428 U.S. 584, 598 (1977). The principle of these holdings appears to be that it is disproportionate and hence constitutionally impermissible for a State to extinguish the life of an offender who has not deliberately extinguished the life of any victim. One member of the Court has explicitly reached this conclusion, Lockett v. Ohio, supra, 438 U.S. at 627-28 (White, J., concurring), but the full Court has thus far refrained from deciding the issue.

The application of recognized Eighth Amendment criteria for gauging the proportionality of punishments supports Justice White's conclusion in Lockett. The Court has indicated that an appropriate method to determine whether a sentence is unconstitutionally disproportionate or excessive is whether it comports with the "evolving standards of decency" reflected in contemporary community judgments on the propriety of a particular sentence. Coker v. Georgia, supra, 433 U.S. at 592; Gregg v. Georgia, supra, 428 U.S. at 173. The petitioner in Lockett presented a study of all executions for homicide since 1954 for which facts were available. Lockett v. Ohio, supra, Brief for Petitioner, at 66 and App. B; 438 U.S. at 624-25 & n.6 (White, J., concurring). That study indicated that "only eight [out of 363] clearly involved individuals who did not personally commit the murder." Lockett, supra, 438 U.S. at 624 (White, J., concurring). Two of those eight had hired others to do the killing. Id. at 625 n.7. Since that study was conducted in 1977-78, two additional

persons have been executed; both had personally killed their victims.[9/]

The statistics contained in the Lockett study concerning the State of Georgia further demonstrate the community judgment that a person who has not himself killed should not be put to death. Of the 36 persons executed for homicide in Georgia since 1954, not a single person was executed who had not personally caused the death of the victim. Indeed, the Supreme Court of Georgia concluded in one case that it was excessive to impose a sentence of death upon a defendant who was not the triggerman or "'prime mover' in the crime," at least in circumstances in which the actual triggerman received a sentence less than death. Hall v. State, 241 Ga. 252, 259-60, 244 S.E.2d 833, 839 (1978).[10/]

Yet, petitioner has been sentenced to die not only without an express finding "that [he] ... engaged in conduct with the conscious purpose of producing death," Lockett v. Ohio, supra, 438 U.S. at 628 (White, J., concurring), but upon a record which would make such a finding by a properly instructed jury implausible in the extreme, if sustainable at all. Before such a death sentence is carried out, the Court should surely grant certiorari to determine whether it is unconstitutionally disproportionate and excessive.

9/ John Spenkelink was executed on May 25, 1979. The facts of his case are reported in Spinkellink v. State, 313 So.2d 666 (Fla. 1975). Jesse Bishop was executed on October 22, 1979. The facts of his case are reported in Bishop v. State, 597 P.2d 273 (Nev. 1979).

10/ The Georgia Supreme Court affirmed the imposition of a death sentence upon a non-triggerman in Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976), but only on the ground that the defendant "was the prime mover in this murder beginning with his breaking down of the victim's door and continuing through the beating of the victim and his attempts to stab the victim and signaling for the victim's death." Id. at 803, 229 S.E.2d at 743. Hill's death sentence was subsequently commuted. See Georgia State Board of Pardons and Paroles, Commutation Proceedings, in State v. Hill, opinion of September 28, 1977.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION INTO EVIDENCE OF PORTIONS OF THE VICTIM'S CORPSE SUBJECTED PETITIONER TO A CAPITAL SENTENCING DECISION SO INFECTED BY PASSION AND EMOTION AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

As this Court has repeatedly declared, both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that the decision to impose a sentence of death must be a reasoned and rational determination and not the product of passion or emotion. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld Georgia's death penalty statute against Eighth Amendment challenge in part because of the express statutory mandate that the state supreme court review every death sentence to determine whether it "was imposed under the influence of passion, prejudice, or any other arbitrary factor." Ga. Code Ann. §27-2537(c)(1); see Gregg v. Georgia, supra, 428 U.S. at 198. In Gardner v. Florida, 430 U.S. 349, 358 (1977), the Court stressed that :

> It is of vital importance to the defendant and the community that any decision to impose the death death sentence be, and appear to be, based on reason rather than caprice or emotion.

The Court reiterated this principle in Godfrey v. Georgia, 100 S.Ct. 1759, 1767 (1980), reversing a death sentence which could not be said to be "'based on reason rather than caprice or emotion.'" Id. In earlier capital cases, the Court similarly paid careful heed to the constitutional concern that the decision to extinguish the life of an individual must not be the product of passion or emotion. See, e.g., Irvin v. Dowd, 366 U.S. 717, 728 (1961)("[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge

a wave of public passion"); Moore v. Dempsey, 261 U.S. 86, 91 (1923)(due process prohibits deprivation of an accused's life where "counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion").

Although the Court has not as yet defined the parameters of this consitutional protection against death sentences based upon passion and emotion, the present case rather obviously demands its application. The evidence presented at petitioner's sentencing retrial over his objection -- the withered, misshapen ear of the eighteen-year-old victim and other pieces of her skin and bone -- was gruesome and by nature inflammatory. The calculated appeal to passion inherent in this grisly evidence was not in any way justified or offset by a serious evidentiary purpose for the admission of the evidence. The State itself offered no plausible justification for bringing these pieces of the victim's corpse before the jury. Although the trial court suggested that the evidence "might have some probative value relating to the velosity [sic] of the weapon" (T. 995), this rationale cannot justify the introduction of the evidence since the caliber and velocity of the weapon employed were never at issue. Moreover, even if there had been any legitimate evidentiary purpose for portraying these objects to the jury, that purpose would have been amply satisfied by the photographs of the same portions of the corpse which the State had been permitted to introduce into evidence. The photographs at least depicted the victim's ear in the original condition at the scene of the crime, whereas the ear itself had become so dessicated that it no longer reflected the condition in which it had been found.

Under common-law evidentiary principles, gruesome evidence must be excluded when, as in the present case, the danger of passion and prejudice outweighs the probative value of the evidence. See, e.g., Maxwell v. United States, 368 F.2d 735, 739-40 (9th Cir. 1966); Holcomb v. State, 130 Ga. App. 154,

155, 202 S.E.2d 529, 531-32 (1973); Commonwealth v. Batty, 482 Pa. 173, ___, 393 A.2d 435, 437-38 (1978). In capital cases, this common-law prohibition against unnecessary injection of passion into the decisionmaking process rises to a constitutional level. When, as here, portions of the victim's body are admitted into evidence even though their admission does not serve any purpose other than inflaming the passions of the jury, it cannot be said that the ensuing sentence of death both is "and appear[s] to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra, 430 U.S. at 358; Godfrey v. Georgia, supra, 100 S.Ct. at 1767.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STATE'S USE OF A TECHNICAL DEVICE TO PREVENT PETITIONER FROM INTRODUCING SIGNIFICANT MITIGATING EVIDENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner's initial death sentence was reversed by this Court because the State had seized upon technical procedural means to exclude mitigating evidence and thus keep from the jury "testimony [which] was highly relevant to a critical issue in the punishment phase of the trial." Green v. Georgia, 442 U.S. 95, 97 (1979)(per curiam). Despite the lesson of Green v. Georgia, the State in the resentencing trial once again took advantage of a technicality to deprive petitioner of mitigating testimony -- this time, the testimony of Father William James, the Alabama priest who had been the head of a foster home in which petitioner had lived.

Father James' testimony was contemplated to provide a substantial part of petitioner's case in mitigation. The only other mitigation witnesses were petitioner's mother and sister, both of whom testified very briefly (T. 1005-12). Petitioner took precautions to ensure that Father James' testimony would be heard by the jury: anticipating the possibility that the time for pre-

senting petitioner's case would fall during the five-day period in which Father James would be unavailable, counsel for petitioner secured the court's permission to take a deposition which could be read to the jury. When this procedure was announced by the court, the State did not object to it and appeared to acquiesce in it. Yet, when Father James appeared for the deposition, the State, aware that he was obligated to leave the next day and would be unavailable until the following week, flatly refused to take the witness' deposition and thereby precluded the presentation of this mitigating evidence to the jury.[11/]

The State's use of a contrivance to keep significant mitigating evidence from the jury raises substantial questions under the Due Process Clause of the Fourteenth Amendment. Green v. Georgia, supra. The requirements of Due Process include a fair opportunity to respond with evidence against the accusations of the State. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). These requirements "include, as a minimum, a right ... to offer testimony." In re Oliver, 333 U.S. 257, 273 (1948). As this Court observed in Washington v. Texas, 388 U.S. 14, 19 (1967),

> [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. ... Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Accord, Chambers v. Mississippi, supra, 410 U.S. at 294, 302; Webb v. Texas, 409 U.S. 95, 98 (1972)(per curiam).

The State's contriving to prevent petitioner from presenting mitigating factors to his sentencing jury also raises a substantial Eighth Amendment question. In Lockett v. Ohio, 438 U.S. 586, 604 (1978), this Court held that "the Eighth and

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11/ The Georgia Supreme Court below asserted that the exclusion of Father James' testimony resulted from defense counsel's failure to follow the trial court's proposed procedure of reading into the record a stipulation concerning the nature of Father James' testimony. Green v. State, supra, slip opinion at 7. This conclusion, however, is not consistent with the record. Although the trial court initially proposed the procedure of

 [Footnote 11/ continued on next page.]

Fourteenth Amendments require that the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death." As the Court has explained, the "qualitative difference between death and other penalties calls for a greater degree of reliability" in the determination that death is the appropriate punishment in a particular case (Lockett, supra, 438 U.S. at 604; Woodson v. North Carolina, 428 U.S. 280, 305 (1976); and the sentencer's consideration, of the mitigating aspects of a defendant's character, record, and offense is indispensable to reliability in the decision to impose a death sentence. Lockett, supra, 438 U.S. at 604-05.

The Court should grant certiorari to ensure that the mandate in Green v. Georgia and the holding of Lockett v. Ohio are not defeated by a State's manipulation of a contrivance to secure a death sentence from a jury which has been prevented from hearing and considering significant mitigating evidence.

IV

IN THE EVENT THAT THE COURT DOES NOT GRANT CERTIORARI ON THE OTHER ISSUES PRESENTED BY THIS CASE, THE COURT SHOULD STAY CONSIDERATION OF THE FOURTH QUESTION PRESENTED PENDING ITS DECISION IN BULLINGTON V. MISSOURI

In Bullington v. Missouri, No. 79-6740, cert. granted, 101 S.Ct. 70 (October 6, 1980), this Court has been presented with the question:

11/ Continued:

reading a stipulation to the jury, the court itself rejected this proposal in favor of the alternative procedure of a deposition after defense counsel explained the need for presenting the actual testimony of the witness to the jury. See p. 6 n.5 supra. Thus, it was the expectation of the trial court and defense counsel, and the apparent expectation of the State, that the deposition procedure would be followed.

> Is it constitutionally permissible under the principles of double jeopardy and collateral estoppel for the State of Missouri to seek the death penalty upon the retrial of a murder case wherein: (a) The jury at the penalty phase of the first trial was instructed to assess punishment at death only upon a finding beyond a reasonable doubt of the existence of certain aggravating circumstances ... and (b) The jury assessed petitioner's punishment at life imprisonment only; and (c) The State has advised the Missouri Supreme Court that the aggravating circumstances and evidence at the second trial would be identical to that presented to the jury at the first trial.

Bullington v. Missouri, supra, Petition for Writ of Certiorari, at 1-2. The petitioner in Bullington has argued that since the first sentencing jury implicitly acquitted him of the charged aggravating circumstances, the submission of identical evidence of these same aggravating circumstances in a resentencing hearing where the prosecution again seeks the penalty of death violates Fifth Amendment protections against double jeopardy and the principle of collateral estoppel embodied in the Fifth and Fourteenth Amendments. Id. at 20-22.

These same questions of double jeopardy and collateral estoppel are raised by the present case. In petitioner's first sentencing trial, the State alleged the aggravating circumstances of murder committed in the course of a rape and murder committed for the purpose of receiving something of monetary value. The jury was carefully instructed on these aggravating circumstances and was told pursuant to Ga. Code Ann. §27.2534.1(c) that in its verdict, it "shall designate in writing ... the aggravating circumstance or circumstances which it found beyond a reasonable doubt." Thus charged, the jury did not return a finding on the aggravating circumstances of rape or commission of murder to receive something of monetary value. The jury's factual finding that these two aggravating circumstances were not present constituted an "'implicit acquittal'" (Price v. Georgia, 398 U.S. 323, 328 (1970)) on them. Thus, when the State resubmitted its evidence of rape and murder for financial gain, it was seeking to litigate previously adjudicated issues of fact, in violation of

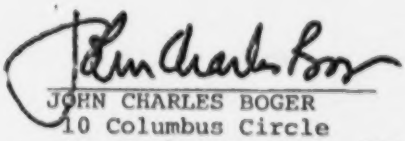
double jeopardy and collateral estoppel. See Price v. Georgia, supra; Ashe v. Swenson, 397 U.S. 436 (1970).

Therefore, in the event that the Court does not grant certiorari on one of the other issues in this case, petitioner requests that the Court stay consideration of the fourth question presented by this petition pending decision of Bullington v. Missouri, supra.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted or, in the alternative, consideration of the petition should be stayed pending the Court's decision in Bullington v. Missouri.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

Dated: New York New York
December 30, 1980

APPENDIX A

YOU ARE TO NOTIFY THE DEFENDANT OF THIS DECISION WITHIN 2 DAYS.

715

In The Supreme Court of Georgia

Decided: OCT - 7 1980

36115. GREEN v. THE STATE.

JORDAN, Presiding Justice.

Roosevelt Green, Jr., the appellant, was convicted and sentenced to death in Monroe County for the murder of Teresa Carol Allen, and the conviction and sentence were affirmed on appeal by this court, Green v. State, 242 Ga. 261 (249 SE2d 1) (1978). The Supreme Court of the United States, however, reversed as to sentence and remanded the case for a new trial on said issue. Green v. Georgia, 442 U.S. 95 (99 SC 2150, 60 LE2d 738) (1979); remand 244 Ga. 27 (257 SE2d 543) (1979) (The United States Supreme Court reversed the sentence on the sole ground that a conversation between co-defendant Moore and Thomas Pasby was excluded during the pre-sentence hearing).

At the new sentencing trial, at which Pasby testified, the jury again returned a verdict for the death sentence, and the case is presently before this court for mandatory review of the same. Code Ann. § 27-2537. The facts surrounding the death of the victim, including the statement of Thomas Pasby, are amply set out in Green v. State, supra, and its companion case, Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978) and will not be repeated here.

ENUMERATIONS OF ERROR

1. Appellant contends that the trial court's denial of his motion for a change of venue violated his right to an impartial jury. The appellant notes that there was widespread pre-trial publicity such that every prospective juror had heard about the case.

We note, however, that while each prospective juror had heard something about the case, each prospective juror not struck for prejudice expressly indicated that he or she could lay aside any opinion that he or she had formed and render a sentence based upon the evidence. Irvin v. Dowd, 366 U.S. 717 (81 SC 1639, 6 LE2d 751) (1960); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979).

We note further that only seventeen of the sixty-four veniremen were excused for cause, and that only four of the seventeen were excused for prejudice.

This low percentage of veniremen excused for prejudice (approximately 5%) strongly corroborates the expressions of impartiality by the other jurors not so excused. Murphy v. Florida, 421 U.S. 794 (95 SC 1555, 43 LE2d 772) (1974); Tucker v. State, supra (5% dismissal rate corroborates absence of prejudicial bias); Collier v. State, supra (20% dismissal rate corroborates absence of prejudicial bias); Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976) (49% dismissal rate corroborates absence of prejudicial bias); Butler v. State, 231 Ga. 276 (201 SE2d 448) (1973) (cert. den. 420 U.S. 907 (1974) (36% dismissal rate corroborates absence of prejudicial community bias; cf. Irvin v. Dowd, supra (1960) (62% dismissal rate corroborates actual juror partiality).

We note finally that the evidence shows only one recent newspaper article concerning the appellant. Eighteen pages of exhibits concern articles published during the first trial - that is, two years prior to resentencing, and three pages of exhibits concern the United States Supreme Court's reversal of sentence. There is no evidence of a "total inundation of the judicial process by the media." Estes v. Texas, 381 U.S. 532 (85 SC 1628, 14 LE2d 543) (1965); Sheppard v. Maxwell, 384 U.S. 333 (86 SC 1507, 16 LE2d 600) (1966).

Furthermore, the appellant failed to exhaust all of his peremptory challenges. Coleman v. State, supra; Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978).

This enumeration of error is without merit.

2. Appellant contends that the trial judge erred in failing to grant his challenge to the array. He asserts that sixty of the traverse jurors serving in the present case had served in the August term of the Monroe County Superior Court and that their service in the present case therefore violated Code Ann. § 59-803. The present trial, however, began on November 5, 1979, which was still within the August term of the Monroe County Superior Court. The jurors were properly summoned (Code Ann. § 24-3009). Also, the mere fact of prior jury service is no basis for a challenge to the array. See Harris v. State, 191 Ga. 243, (12 SE2d 64) (1940); Dickerson v. State, 151 Ga. App. 429 (260 SE2d 535) (1979). Finally, we note that the appellant cannot complain that his jury panel did not represent a cross-section of the community, as there was no showing that the August jury list or the panels put upon the appellant were constitutionally inadequate. Appellant's second enumeration of error is without merit.

3. The appellant argues that the trial court erred in refusing to allow him to question each prospective juror on voir dire outside of the presence of the other jurors, and, in refusing to allow him to use written juror information forms to obtain extensive background information on each juror.

Such matters are necessarily within the sound discretion of the trial court. Finney v. State, 242 Ga. 582 (250 SE2d 388) 1978). The trial court did not abuse its discretion in denying the appellant's motion. This enumeration is without merit.

4. Appellant contends that jurors were removed for cause in violation of the Witherspoon rule. The responses of the excluded jurors, however, clearly established that they would automatically vote against the imposition of the death penalty regardless of the facts and circumstances of the case. Their exclusion by the trial court was not error. Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968); Lockett v. Ohio, 438 U.S. 586 (98 SC 2954, 57 LE2d 973) (1978).

Appellant's additional argument that irrespective of Witherspoon such exclusions deprived him of a representative cross-section of the community is also without merit. Bowen v. State, 244 Ga. 495 (260 SE2d 909) (1979).

5. The appellant argues that the trial court erred in not striking for prejudice two prospective jurors, the first of whom had been a spectator not only at the appellant's previous trial, but also at the trial of his co-defendant, Moore, and the second of whom was a secretary in the law firm that had represented the appellant's co-defendant. While the second juror had formed his opinion as to guilt, neither juror had formed an opinion as to sentence.

Appellant had been tried and convicted of the crime of murder. The sole question to be tried was that of punishment. Since neither juror had any opinion as to sentence, neither was subject to a challenge for prejudice. Code Ann. §§ 59-804, 59-806 and 59-807. Appellant's fifth enumeration of error is without merit.

6. Appellant complains that the five armed deputies present in the courtroom conveyed to the jury that the defendant was dangerous in violation of his right to an impartial jury. We do not agree.

The appellant was a convicted murderer with a record of escape. The courtroom contained numerous doors and windows.

"A defendant has a right to be tried in an atmosphere free of partiality created by the use of excessive guards except where special circumstances exist. . . ." Allen v. State, 235 Ga. 709, 711 (221 SE2d 405) (1975) citing Kennedy v. Cardwell, 487 F2d 101 (6th Cir. 1973). One such special circumstance is a history of escape. Allen v. State, supra.

Appellant also argues that the trial judge abdicated the security of the courtroom to the discretion of law enforcement personnel. The trial judge's order reads as follows: "The security of the courtroom is a matter which addresses itself to the Sheriff, in his discretion, as to the type of security required and will not be interfered with by the court in the absence of a flagrant abuse of this discretion." (Emphasis supplied.) It is apparent from the trial court's order that while the sheriff was charged with the security of the courtroom, the trial court continued to oversee the sheriff's security measures. We hold that the trial court neither abused nor abdicated its discretion and that this enumeration of error is without merit.

7. Appellant argues that the trial court erroneously admitted into evidence three statements which he had given involuntarily and without waiver of his Miranda rights. This argument was decided adversely to the appellant on his previous appeal and he, therefore, cannot raise this issue in the present appeal. Burzer v. State, 245 Ga. 458 (265 SE2d 296) (1980).

8. The appellant contends that his right against double jeopardy was violated by the introduction of evidence which supported two aggravating circumstances charged to, but not found by, the jury in appellant's initial trial. The statutory aggravating circumstances set forth in Code Ann. § 27-2534.1(b)(1-10)

are not offenses within the meaning of the double jeopardy clause. Redd v. State, 242 Ga. 876 (252 SE2d 383) (1979). The trial court did not err in admitting the contested evidence.

9. Appellant alleges error in the admission into evidence of certain portions of the victim's body. This evidence was admitted at the initial trial and found upon appeal to be admissible. Green v. State, supra. The appellant cannot now raise the same issue on appeal of the resentence hearing. Burger v. State, supra.

10. The appellant contends that the admission of evidence which does not support a statutory aggravating circumstance violates the Eighth and Fourteenth Amendments by allowing the sentencing body to sentence in the standardless manner condemned in Furman v. Georgia, 408 U.S. 238 (92 SC 2726, 33 LE2d 346) (1972).

Under our statute, a jury cannot impose the death sentence unless the state proves beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. This statutory scheme has repeatedly been held constitutional. Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859) (1978). However, it is also constitutionally required that a statute providing for the death penalty allow the sentencing body the discretion to weigh all aspects of the defendant's character and record as well as the circumstances of the offense. See Lockett v. Ohio, supra; Fair v. State, (Case #35701, decided 1980).

We find the statutory procedure directs and limits the discretion of the sentencing body so as to minimize the risk of "wholly arbitrary and capricious action" in inflicting a death penalty. Gregg v. Georgia, supra.

11. The appellant subpoenaed an out-of-state witness, Father William James, who had been head of the foster home in which the appellant had lived. When the court was informed that the witness might not be able to testify in sequence, that is, after the state rested, the court stated, "I don't want to break into the State's case, but I will let you put a stipulation into the record. . . . If the State's not through I will send the jury to the room and put him up . . . and let him be cross examined and then at the proper time, I will let you introduce that record." The defense counsel acquiesced. However, when the witness arrived, the defense counsel, instead of addressing the court, asked the district attorney to participate in a deposition. The district attorney refused, and the witness left the state.

The appellant argues that the refusal of the district attorney to participate in a deposition deprived him of an important mitigating witness. We do not agree. The trial court had formulated a device, upon agreement of defense counsel, to preserve the desired testimony without interrupting the orderly sequence of the trial, and the complained of deprivation was the result of defense counsel's failure to comply with the trial court's reasonable discretion. There is no merit in appellant's eleventh enumeration of error.

12. The appellant contends that the trial court erred in denying his motion for mistrial premised on the court's allegedly improper comment on his failure to testify.

Appellant, upon proper motion, was allowed to act as co-counsel. As such, he was allowed to present part of the closing argument. Prior to addressing the jury, appellant was cautioned by the trial court as to the proper limits of argument.

During closing argument, appellant stated: "I wasn't there; . . . I didn't have no idea that man was going to kill

this young lady." The state objected and was sustained. The court then instructed the jury to disregard the statement and rebuked appellant in the following language: "I will state to the jury, this man has not testified during the trial of the case and the state did not have an opportunity to cross examine him and he cannot make an unsworn statement to you at this time concerning the things he's just saying. He's acting as his own co-counsel and he is allowed to argue the evidence in the case, but he cannot get before you now and give testimony or give evidence. That should have come from the stand under oath, if he desired to do it. I will sustain the objection. I cautioned you about that and I know that you aren't tutored in the law and I understand but you can argue the evidence but do not make any statements in the nature of testimony."

First, we hold that the trial court did not abuse its discretion in ruling the appellant's argument improper. While the appellant, in closing argument, was entitled to draw inferences from the evidence, the appellant was not entitled to give new evidence in the form of his own direct testimony.

Given the state's timely objection to the appellant's improper argument, the court was under an affirmative duty to instruct the jury to disregard said argument and to rebuke counsel for his remarks. Brown v. State, 110 Ga. App. 401 (138 SE2d 741) (1964). The failure to so instruct and rebuke allows the improper argument to go to the jury with the apparent sanction of the court. Estep v. State, 129 Ga. App. 909 (201 SE2d 809) (1973); Moorehead v. Counts, 130 Ga. App. 453 (203 SE2d 553) (1973).

The extent of the rebuke and instructions is within the discretion of the trial judge. Benefield v. State, 140 Ga. 727 (232 SE2d 89) (1976). We conclude that the trial court's instructions to the jury as quoted were not direct comments on the failure of the defendant to testify, but were explanations as to

why such statements were to be disregarded by the jury. See Driver v. State, 118 Ga. App. 559 (164 SE2d 360) (1968). This enumeration is without merit.

13. Appellant contends that the prosecutor deliberately injected passion and prejudice into the hearing, by two improper comments during voir dire. This court finds that both statements were made in legitimate argument, either to correct inaccurate statements made by defense counsel, or to set forth the state's position regarding an obviously unlawful voir dire question. We also note that the statements reflected facts later placed before the jury by competent evidence. We find no error. Reference to the affirmance of appellant's conviction does not violate the rule of Prevatte v. State, 233 Ga. 929 (214 SE2d 365) (1975).

The appellant argues that passion or prejudice was also injected into the proceedings by the state's asking the arresting officer on direct examination why appellant was arrested in South Carolina, to which the witness replied "well we had an armed robbery . . ." When defense counsel moved for a mistrial, the trial court asked counsel if he wished the jury to be instructed to disregard the remark. When defense counsel answered in the affirmative and requested that the instructions be given in the language he suggested, the trial court complied with his request and instructed the jury to disregard the contested evidence. Sprouse v. State, 242 Ga. 831 (252 SE2d 173) (1979). This enumeration is therefore without merit.

14. Appellant argues that he was entitled to a jury instruction that the appellant is presumed innocent of the alleged statutory aggravating circumstances. This argument has been raised before and decided adversely to appellant's position. Finney v. State, 242 Ga. 582 (250 SE2d 388) (1978).

15. Enumerations of error 15, 18, 19 and 30 concern the sentence and will be addressed in that portion of this opinion.

16. During deliberations, a juror fainted and the trial judge questioned the foreperson of the jury as to the physical status of the ill juror. The foreperson answered that the juror was physically and emotionally unable to continue and that the juror had requested to be relieved. The foreperson also told the court that from her personal observation this juror was unable to continue. The trial court excused the juror, and substituted, without objection, the first alternate. Appellant alleges error and argues that the trial court should have questioned the ill juror itself. We do not agree.

Such matters are necessarily within the discretion of the trial court and no abuse of discretion has been shown. The substitution of the alternate juror was proper. Tanner v. State, 242 Ga. 437 (249 SE2d 238) (1978); Code Ann. § 59-910. Enumeration of error 16 is without merit.

17. Appellant contends that the trial court erred in failing to sentence the appellant to life imprisonment in that the verdict returning the death sentence was not unanimous.

After the verdict and sentence of the court, and after asking if he was excused, defense counsel requested a poll of the jury. During the poll, a juror replied to the question, "Is this your verdict now" by stating, "No, its not, Your Honor. I cannot do it." The juror previously had responded that the verdict was his verdict in the jury room.

The judge took a three-minute recess and then, upon information that the juror had misunderstood the question, called the jurors back and explained what was meant by the question asked. The jury was then polled and the formerly reluctant juror answered that it was his verdict. We find no error.

First, the motion to poll was not timely made. A motion to poll the jury must be made after the verdict is read, and

before sentence is passed. Favors v. State, 234 Ga. 80 (214 SE2d 645); Plummer v. State, 229 Ga. 749 (194 SE2d 419) (1972). Second, counsel did not move for a change of sentence, apparently being satisfied by the second poll that the jury was in fact unanimous. See Whisman v. State, 221 Ga. 460 (145 SE2d 499) (1965) cert. den. 384 U.S. 895. Hargett v. State, 151 Ga. App. 532 (260 SE2d 406) (1979). Third, the record shows that the response of the juror was due to a misunderstanding. The juror thought that the court was asking, "If he was responsible for the whole thing." Jurors, being laymen, can well misunderstand some procedures and unless informed of the meaning of the poll could easily believe that they are being asked to be personally responsible for the consequences of their verdict. See United States v. Duke, 527 Fed 386 (5th Cir. 1976). This is especially true after the jury has heard sentence passed. Favors v. State, supra. The trial court having properly instructed the jury and corrected any misunderstanding, we find no merit in this enumeration. See United States v. Duke, supra.

The appellant, however, further argues that it was error for the bailiff to report to the trial court that the jurors misunderstood the meaning of the poll. We find no merit in this argument. The record reflects that the bailiff overheard the jurors telling the foreperson of their misunderstanding and that he simply reported this fact to the court.

Finally, the appellant argues that the trial court's polling of the jury did not meet the minimal requirements of a poll. The trial court asked each juror, "You have heard the verdict published. Is this your verdict?"

There is no uniformity in, nor statutory authority for, polling a jury although it is a material right derived from common law. White v. Seaboard C.L.R. Co., 139 Ga. App. 833

(229 SE2d 775) (1976). The object of the poll is to ascertain before the public and the prisoner that the verdict agreed upon in the jury room is still the unanimous verdict of the jury. Hill v. State, 64 Ga. 453 (1880). See Young v. State, 239 Ga. 53 (236 SE2d 1) (1977). We hold that, under the circumstances of this case, that is, after sentence, without objection and after instructions as to the meaning of the jury poll, the question propounded met the minimum requirements for determining if the verdict was, at that time, the verdict of a unanimous jury. We are mindful of our prior cases, such as Burnett v. State, 240 Ga. 681 (242 SE2d 79) (1978); however, those cases concerned themselves with a timely poll of the jury and are not applicable here.

SENTENCE REVIEW.

The death penalty imposed in this case must be reviewed by this court under the standards set forth in Code Ann. § 27-2537(c)(1-3). Thus, we must determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the the jury's finding of the statutory aggravating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant.

18. Appellant contends that the trial court's omissions in the "trial judge's report" concerning resentencing deprives him of a full and adequate appellate sentence review. We note that the trial judge filed the "trial judge's report" concerning resentencing, and that the former report included the information omitted from the latter. We note also that trial counsel filed objections and comments as to parts of the "trial

judge's report." Taken as a whole, these three documents contain the information necessary to assist this court in fulfilling its statutory mandate. This enumeration is without merit.

19. The appellant argues that the cumulative effect of the errors by the trial court was the imposition of the death penalty amid passion and prejudice. Upon review of the entire transcript and record in this case, we find that this enumeration is simply unsupported by the record and is without merit. This court concludes that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

20. We have reviewed the trial court's charge to the jury and find that it is not subject to the defects dealt with in Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977) and Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977).

21. The jury found the following statutory aggravating circumstances: (1) The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping. Code Ann. § 27-2534.1(b)(2); (2) The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery. Code Ann. § 27-2534.1(b)(2); (3) The murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

The evidence supports a finding of the three aggravating circumstances by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, U. S. (99 SC 2781) (1979).

As part of our independent review, however, we note that the trial judge improperly instructed the jury as to the definition of kidnapping (the definition given was simple kidnapping, Code Ann. § 26-1311(a), not kidnapping with bodily harm). Burger v. State, supra. See Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1980). However, we need not decide whether the death penalty imposed in this case must be set aside on this ground. Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not taint the proceedings so as to invalidate the other aggravating circumstances found and the sentence of death based thereon. Burger v. State, supra; Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974). No prejudice to the defendant resulted because the evidence of a capital kidnapping - that is, with bodily injury - was properly before the jury and such evidence beyond a reasonable doubt would support a finding that the murder occurred during a kidnapping with bodily injury. Patrick v. State, supra. See Collier v. State, supra.

22. Appellant asserts that Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied under the facts of this case. Godfrey v. Georgia, 27 CL 3115, 45 USLW 441 (5/19/80). We have recently held that in order for Code Ann. § 27-2534.1(b)(7) to be constitutionally applied, the evidence presented at trial must satisfy certain specific criteria. Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980).

Under the evidence of this case, the victim, an eighteen-year-old female, was forcibly abducted from her place of employment. Once in the victim's car, appellant turned to the victim and said, "Bitch, take off your clothes." The victim pleaded that she was a virgin and not to rape her. While no body fluids of the appellant's blood type were found, testimony established sexual abuse of the victim by the appellant. Thereafter, appellant

changed places with Moore, who was driving the victim's car, and Moore raped the victim so forcibly as to tear her vagina. The victim was then shot twice by a high powered rifle. The first shot to the body did not kill the victim but caused severe and disfiguring injuries to the abdomen, forearm and wrist. She was shot a second time in the face causing portions of the same to be literally blown to pieces. Death ensued from loss of blood. There was testimony that she was lying on the ground "moaning or crying" when the second shot was fired.

The murder was outrageously or wantonly vile, horrible or inhuman in that this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. Hance v. State, supra. The victim was abducted and sexually assaulted prior to death. Stevens v. State, 245 Ga. 583 (266 SE2d 194) (1980); Burger v. State, supra. The victim was not killed instantaneously nor was this a domestic murder. She gave the appellant no reason whatsoever to assault her and was in no manner threatening. The appellant fled and attempted in every manner to hide his crime. See Godfrey v. Georgia, supra; Hance v. State, supra.

Torture occurs when the victim is subjected to serious physical abuse before death. Serious sexual abuse may be found to constitute serious physical abuse. In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. Hance v. State, supra.

Under the facts of this case, we find that the murder was of the type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim as set forth above. This enumeration is without merit.

23. Appellant contends that the sentence of death is excessive and disproportionate in that he did not intend the death of the victim. Appellant argues that he was not actually present when the fatal shots were fired and that he was not aware the victim would be killed. While he did not testify, he emphasizes that the evidence shows that no footprints of the shoes he usually wears were present. Similarly, he emphasizes the testimony of Thomas Pasby that the co-defendant said that he, not appellant, shot the victim after the appellant was sent to get gas.

A rational trier of fact, however, could have found from the record, beyond a reasonable doubt, that the appellant either shot the victim or was present when it occurred. Jackson v. Virginia, supra. There was evidence that the appellant bragged that he had killed the victim. Gloves found at the murder scene had hair on it similar to both the appellant's and the victim's. There was no evidence presented as to what type of shoe the appellant was wearing at the actual time of the murder. Furthermore, a black male, with another black male as a passenger, was seen driving an automobile similar to the victim's (with only the letters RENS showing on the tag) into a gas station near the scene of the crime.

Cases cited by the appellant, Hall v. State, 241 Ga. 252 (244 SE2d 833) (1978) and Hill v. State, 237 Ga. 794 (229 SE2d 737) (1976) are not applicable here. In those cases, one party to a crime received a life sentence while another received a death sentence. Here both defendants received a death sentence.

The evidence most favorable to the defense shows that the appellant actively and knowingly participated in the entire criminal enterprise including the robbery, kidnapping and rape of the victim. He left her on a lonely rural road on a cold wet night with a person he knew to be armed and violent. He went

for gas and when he returned he helped throw her mutilated body into the underbrush. He then took some of the stolen money, the victim's car and the murder weapon and fled the state. The defendant's participation in the murder cannot, on any reasonable basis, be termed minor. Compare McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980) with Burney v. State, 244 Ga. 33 (SE2d) (1979). See also Stevens v. State, supra; Burger v. State, supra. The record simply does not support the appellant's argument and therefore this enumeration is without merit.

In reviewing the death penalty in this case we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed and find that the similar cases listed in the appendix in the appellant's first appeal, Green v. State, supra, and the cases decided since that case listed in the appendix attached hereto, support the affirmance of the death penalty in this case. Roosevelt Green, Jr.'s sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur except Hill, J., who dissents.

APPENDIX

36115. GREEN v. THE STATE

1. Green v. State, 242 Ga. 261 (249 SE2d 1) (1978)
2. Baker v. State, 243 Ga. 710 (257 SE2d 192) (1979)
3. Brooks v. State, 244 Ga. 574 (261 SE2d 397) (1979)
4. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979)
5. Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979)
6. Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1980)
7. Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1980)
8. Burger v. State, 245 Ga. 458 (265 SE2d 296) (1980)
9. Stevens v. State, 245 Ga. 583 (266 SE2d 194) (;980)

HILL, Justice, concurring in part and dissenting in part.

Regarding division 1, citing Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976), see my dissent in that case. I therefore concur only in the judgment as to division 1.

Regarding divisions 9 and 19, I am revolted by the macabre spectacle of the state's introduction upon resentencing of Teresa Carol Allen's pathetic ear, now so withered and misshaped as to mislead the jury as to the condition of the body when it was found. While there might have been justification for such conduct at the guilt-innocence trial, Green v. State, 242 Ga. 261 (8b) (249 SE2d 1) (1978), there was none here other than to inflame the jury. I therefore am unable to agree to the imposition of the death penalty because I cannot find that it was not imposed under the influence of passion or other arbitrary factor. Code § 27-2537(c)(1). Further, I believe the deceased's ear is entitled to humane disposition rather than being treated as a gruesome souvenir of her tragic death. I therefore dissent to divisions 9 and 19.

Regarding division 16, after deliberating a little over 3 hours, the jurors returned to the courtroom to ask: "Can a sentence be given, 'Life in prison without parole?'" The judge informed the jury that he was unable to answer the question. After asking if the jury could have a witness' answer to a question read if the jury decided it was needed, the jury retired. Twenty-five minutes later, the foreperson returned to the court to say that a juror, Dorothy Todd, had fainted in the corridor when leaving the courtroom earlier and was, in the foreperson's opinion, physically and emotionally unable to continue, and the juror had asked to be excused. The court excused juror Todd based upon the foreperson's statement and replaced her with an alternate juror. On appeal the defendant alleges that after the

court declined to answer the question about "life without parole", the juror, upon leaving the courtroom, fell to the floor, shaking and waiving her arms and saying in a voice loud enough to be heard in the courtroom: "I can't do it, I can't do it, I can't do it." The state does not refute his assertion.

It appears highly probable that the reason the juror was unable to continue (and the reason she requested to be relieved) may well have been that she couldn't impose the death penalty. In my view, the trial court should have questioned the juror personally as to the reason for her being unable to continue. The juror was qualified during voir dire under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968), and from all that appears she was stricken by the court during deliberation because she was unable to vote for capital punishment under the facts of this case. See Lewis v. State, 246 Ga. 101 (SE2d) (1980). This is a violation of Witherspoon just the same as if she had been stricken during voir dire. See also Miller v. State, 237 Ga. 557, 559 (229 SE2d 376) (1976). I therefore dissent to division 16.

For the foregoing reasons I dissent to the imposition of the penalty of death in this case.